IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 832 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MAHENDRABHAI BABARBHAI VASAVA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 832 of 1992

MR MA KALATHIL for Petitioner No. 1

MR PR ABICHANDANI ADDL PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 09/10/2002

ORAL JUDGEMENT

#. This appeal arises out of the judgment and order rendered by the Additional Sessions Judge, Bharuch [Rajpipala] in Sessions Case No.153 / 1989 on June 24,

1992 convicting the appellant for the offence punishable under Section 304 [2] of IPC sentencing him to undergo R.I. for three years.

#. The facts of the case in brief are that the appellant belongs to village Zokala, Taluka Valia, District Bharuch. It is alleged that on May 11, 1989 at about 6.00 p.m. when Bachubhai Sukabhai returned home, he found that his wife Amrutben had gone to the house of Baldev Nagaji for viewing television. He, therefore, called her but she did not come instantaneously, which act, provoked Bachubhai Sukabhai Vasava and he therefore started flinging abuses. On his giving abuses, accused appellant Mahendrabhai Babarbhai Vasava picked up a stick and inflicted blow on his head. Because of the impact, Bachubhai Sukabhai fell down. His wife Amrutben and others took him to his home and gave him household treatment. Ultimately, Bachubhai Sukabhai Vasava expired on 15th May, 1989. On his demise, Divasiya Suka lodged a complaint before the police. The police registered the offence and investigated the case. On investigation, the police having found evidence against the appellant and one Babar Haraji Vasava, filed chargesheet against them. As the offences were triable exclusively by the Court of Sessions, the case was committed to the Court of Sessions and Sessions Case No.153 / 1989 came to be registered.

#. The Additional Sessions Judge framed charge at Exh.1 against both the accused for the offences punishable under Section 302, 323 and 502[2] of IPC. The accused pleaded not guilty to the charge and claimed to be tried. After considering the evidence led by the prosecution, learned Additional Sessions Judge came to the conclusion that charge for offences under Section 304 Part II of IPC was successfully established by the prosecution against the accused No.1 - the appellant. He therefore convicted him for the said offence and sentenced him to undergo R.I. for three years. Learned Additional Sessions Judge also observed that charges for offence punishable under Section 323 and 506[2] could not be established against accused No.1 - appellant herein and therefore acquitted him of those charges. Learned Additional Sessions Judge acquitted the accused No.2 - Babar Harji Vasava of all charges by a judgment and order which is the subject matter of challenge in this appeal.

#. Learned advocate Mr.Kalathil submitted that the whole prosecution story, if properly examined, is bundle of doubtful material. He submitted that although the prosecution has examined eye witnesses to the incident,

some of the witnesses are ruled out to be eye witnesses even by the trial court. Mr.Kalathil submitted that version that is given by the eye witnesses is not supported by the other independent evidence of the prosecution itself. All these witnesses consistently speak of only one blow having been inflicted by the appellant but medical evidence indicates that there were two serious injuries on the head of the deceased which could have been caused only by two separate and distinct blows. This aspect remains unexplained. Learned advocate Mr.Kalathil submitted that the deceased and his family members are educated. The nature of injury, if seen, would indicate that it was of very serious nature and despite this, the deceased was not taken to a Doctor for medical treatment. Not only that, no complaint was lodged till the deceased expired. Thus, gross inaction in taking the deceased to the Doctor and late lodging of the complaint have remained unexplained in substance. Although, an attempt is made to explain this by saying that threat was administered and because of threat, no action was taken. Learned advocate Mr.Kalathil submitted that in this regard also the witnesses are not consistent with each other. Learned advocate Mr.Kalathil submitted that each of these circumstances individually may not assume sufficient strength for reversal of conviction or recording of acquittal. But all of them taken collectively would clearly indicate that there is something fishy about prosecution case. The prosecution is not coming out with true and correct version about the incident and / or its origin. It is clear that FIR is given by Divasiya Suka but he is not the real author of it. It was therefore urged that taking all these factors collectively, the benefit may be given to the appellant accused.

4.1 Learned advocate Mr.Kalathil submitted that when the incident occurred, the appellant was only twenty two years of age and had no antecedents of criminal nature and no enmity. Mr.Kalathil submitted that conviction has wrongly been recorded and therefore, this Appeal may be allowed.

#. This Appeal is opposed by learned APP Mr.P.R.Abichandani. According to him, there is direct evidence of Amrutben - wife of the deceased, Champak nephew of the deceased, Chhabaliben and Diwaliben who are independent witnesses. All these witnesses collectively and consistently implicate the appellant. They have no reason to falsely implicate the appellant and there is no reason to disbelieve their say. Mr.P.R.Abichandani,

learned APP therefore urged that the trial court having considered all these aspects has recorded the conviction and a man has lost his life at the hands of the appellant and therefore the appeal may be dismissed.

#. This Court has gone through the record and proceeding and has considered the evidence on record. The complaint is lodged by Diwasiya after demise of Bachu Suka that is after about four days. Divasiya is examined at Exh.15. He posed to be an eye witness. He says that when Bachu Suka came back from his job, his wife Amrutben had gone to the house of Baldevbhai Nagaji for viewing the Television. He therefore went to call her and started giving abuses. The appellant - Mahendrabhai Babarbhai Vasava felt that Bachubhai is abusing him and he therefore gave a stick blow on head of Bachu Suka. Bachu Suka started bleeding from head injury and fell down and therefore, witness himself, Champak and Chatur left Bachu Suka and took him to his house. At that time, Bachu Suka was unconscious and he remained unconscious for three days. That he was not able to walk properly and on third day he expired at about 1.30 p.m. The witness says that the appellant - Mahendra Babar, Babar Harji and Lal Ranchhod threatened them if they take Bachu Suka to hospital, they would kill them. Therefore, they did not take Bachu Suka to hospital, nor did they give any complaint about the incident. He says that Amrutben wife of Bachu Suka told that it is a question of job and therefore complaint is not to be given. He says that he had shown the place of incident to the police.

The witness is cross examined and he says that he was at the house of Bachu Suka at the time of incident. He says that at the time of incident, he was staying separately from Bachu Suka. However, then he says that when the incident occurred, he was in his own house situate on Dharoli Jokala Malpur road. That his house is at distance of about 300 to 400 steps from the house of Ranchhod Nagaji. He says that at the time of incident, his wife and his mother were also with him at his residence. He states in his cross examination further that Jyotsana - daughter of Bachu Suka came and informed him. He, therefore, reached to the place and found that Bachu Suka was lying on the ground. He denies suggestion that he had not stated in his complaint that Mahendra Babar, Babar Harji and Lala Ranchhod had administered threat that if they take Bachu Suka to hospital, they would be killed and therefore, they did not take Bachu Suka to hospital.

#. Amrutben Bachubhai is examined at Exh.16. She says

that she and her daughter had gone to see television. Others had also gathered which included Champaben Ambubhai, Rupaliben Chaturbhai, Chhabaliben Ramnbhai and Diwaliben Raisinhbhai. She says that her husband came from service at quarter to six. At that time, she was viewing television and he came there. Her husband called her but she did not get up quickly and therefore, her husband started giving abuses. Hearing this, Mahendrabhai Babarbhai picked up a stick which was lying there and gave a blow with the stick on head of her husband. Her husband therefore fell down. They took her husband to home. Her husband was bleeding from head injury. She says that she had sent Jyotsana to call Champak Raman and brother in law Diwasiya and they took her husband to home. She says that her husband started vomiting on reaching home. She says that Mahendra Babar and Babar Harji and Lala Ranchhod had administered threat on them if they take Bachu Suka to hospital they would set the house at fire and kill all of them.

7.1 She has been cross examined. She denies a suggestion that she had not stated in her police statement that they were threatened that if they take Bachu Suka to hospital, their house would be set at fire. She admits that her husband deceased Bachu Suka was serving as Talati. She says that about fifty to sixty persons had gathered to see television. She denies to have stated to her brother-in-law the complainant that complaint is not to be lodged as her husband's service may be at stake.

#. The witness Champakbhai Ramanbhai Vasava was examined at Exh.17. He says that Mahendra Babar inflicted a stick blow on Bachu on the head. Bachu Suka fell down immediately and therefore, he, Chaturbhai and Divasiya Suka took Bachu to his home. He says that he was staying with Bachu when the incident occurred. He denies a suggestion that he was not viewing the T.V. at the time of incident. He also denies a suggestion that there was some dispute between the Ranchhod Nagaji and deceased Bachu Suka and therefore, a false case is made out against the accused persons.

#. The witness Chhabaliben Ramanbhai examined at Exh.18, who also says that Mahendra Babar inflicted a stick blow on the head of Bachu Suka. Bachu Suka was lifted to his house. She has been cross examined and admits that she has not stated before the police that because of threat given, Bachu Suka was not taken to hospital.

##. Witness Diwaliben Raisinghbhai was examined at

Exh.19. She also says that at the time of incident, Bachu started giving abuses to Amrutben but though Bachu Suka was giving abuses to his wife, Mahendra Babar inflicted a stick blow on head of Bachu Suka. Bachu Suka fell down. He had sustained head injury which was bleeding. Bachu Suka was lifted to his home where household treatment was given.

##. The complaint was given by Divasiya which is exhibited at Exh.21.

##. Dr.Gopalbhai R. Gupta examined at Exh.23. He says that he had performed Postmortem on 16th May, 1989 at 9.40 a.m. and concluded the same at 12.45 p.m. He describes external two injuries, the first injury C.L.W. of 2.5 x 1.5 x 1.5 c.m. on bone of skull near Anterior fontelle and second C.L.W. of 3 x 1.5 c.m. x 8 c.m. deep on right parital bone near posterior fontelle fractured into pieces and the brain substance was also damaged and postterior. The postmortem notes are at Exh.24.

##. If above evidence is considered in light of the contentions raised before this Court, it is amply clear that the deceased has sustained two injuries and both were of serious character. One was 8 c.m. deep on the parietal region and brain substance was also damaged. Admittedly the deceased was working as Talati. His wife Amrutben is reasonably educated and despite this, after the incident, the deceased is taken home followed by total inaction on the part of the all concerned. Neither the deceased is taken to hospital nor the complaint is lodged till he expired three days thereafter. This inaction is sought to be explained by saying that threat was administered by the accused persons. In fact, cross examination indicates that this is an improvement made with a view to explain the inaction. This is purely an afterthought.

##. It is also worth a note that all witnesses who claimed to have seen the incident are unanimous about the fact that on hearing the deceased giving abuses, the appellant picked up a stick and inflicted a blow on his head. On receiving the blow, the deceased fell down and was thereafter lifted to home. If this is so, fact remains that none of the witnesses explained how the deceased had sustained two injuries. This assumes a greater importance because of the subsequent conduct on the part of the complainant and the wife of the deceased who took no action for three days and then tried to explain that it was because of threat administered by the

accused. The injuries are such that they could be caused only by two separate and distinct blows and they are of such a nature that if two blows were given, they could not have escaped the attention of all the witnesses. Therefore, version given by the witnesses calls for a closer scrutiny.

##. The complainant claims to be an eyewitness. However, during cross examination, he admits that when the incident occurred, he was in his own house which is about 400 to 500 steps away from the house of Ranchhod Nagaji and he went to place on being informed by the daughter of deceased. This aspect also emerges from the deposition of Amrutben wherein she says that after the incident occurred, she sent her daughter to call the complainant and others. The complainant also admits that when he reached the place, the deceased was lying on the floor. This would mean that the complainant is not an eye witness. He has shown tendency of improving his case.

##. About inaction, the complainant says that he was told by Bai Amrut not to tell anyone, otherwise, it may adversely affect the service of the deceased. However, Amrutben has denied this fact. The question that remains unanswered is that why there was inaction on the pat of the complainant or Amrutben ? whether it was threat administered by the accused or whether it was question of job of the deceased. Two different versions are coming out and both are in contradiction of each other and both are not supported obviously by any evidence and are obviously improvement in the original versions. This inaction assume greater importance because of the fact that the injury was of serious nature, brain substance was protruding, it was bleeding, the injury was as deep as 8.0 c.m. in head, skull fractured into pieces and despite this, no attempt is made to give medical treatment. This makes the prosecution story doubtful in the sense that, is it a really a correct story that being given by the prosecution or is an incident occurred in a different manner. It is also worth to note that the deceased has sustained the grave injury. It is a case of the prosecution that he was bleeding from the injury and obviously he must be bleeding considering the nature of the injury. It is prosecution case that he fell down on receiving the injury. Thereafter, Jyotsana was sent to call the complainant and other they came and lifted him to his house. Differently put, the deceased was lying at the spot for some time with fresh bleeding injury on his head and still Panchanama Exh.8 clearly indicates that

there are no blood marks. The question therefore is whether the incident is taken place at the place as is alleged particularly in light of above doubtful circumstances.

##. The sum total of the above circumstances that the prosecution story if it is taken as a whole does not inspire confidence and does not deserve to be accepted for recording and / or upholding the conviction. There are discrepancies and contradictions in the evidence. There are improvements made in the evidence with a view to suit the requirements of the prosecution case and therefore, conviction and the sentence cannot be upheld. The appeal, therefore, deserves to be allowed and the same is allowed accordingly. The impugned judgment dated 24th June, 1992 rendered by Additional Sessions Judge, Bharuch in Sessions Case No.153 / 1989 is hereby quashed and set aside. The appellant is acquitted of the charge levelled against him. His bail bond will stand cancelled.

Date : 9-10-2002 [A.L.Dave, J.]

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